

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TALECRIS BIOTHERAPEUTICS, INC. and
BAYER HEALTHCARE LLC,

Plaintiffs,

v.

BAXTER INTERNATIONAL INC. and
BAXTER HEALTHCARE CORPORATION,

Defendants.

BAXTER HEALTHCARE CORPORATION,

Counterclaimant,

v.

TALECRIS BIOTHERAPEUTICS, INC. and
BAYER HEALTHCARE LLC,

Counterdefendants.

Civil Action No. 05-349-GMS

Jury Trial Demanded

PUBLIC VERSION

**DEFENDANTS' MOTION IN LIMINE NO. 4 TO PROHIBIT ANY
EVIDENCE OR ARGUMENT REGARDING ALLEGED COMMERCIAL SUCCESS**

OF COUNSEL:

James G. Gilliland, Jr.
Susan M. Spaeth
Anne M. Rogaski
TOWNSEND AND TOWNSEND AND
CREW LLP
379 Lytton Avenue
Palo Alto, California 94301
(650) 326-2400

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Philip A. Rovner (#3215)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000
Email: provner@potteranderson.com

*Attorneys for Defendant
Baxter International Inc. and
Defendant/Counterclaimant
Baxter Healthcare Corporation*

I. INTRODUCTION

Plaintiffs' expert witness, Christopher J. Bokhart, offers an opinion as to the alleged commercial success of Plaintiffs' Gamimune N S/D product that completely lacks foundation. In order to prove commercial success as a secondary indicia of nonobviousness, Plaintiffs must first demonstrate that they sold a product embodying the claims of the patent-in-suit ("the '191 patent"). They do not and cannot. For this reason, Baxter respectfully moves *in limine* for an order prohibiting Plaintiffs and their counsel from mentioning, eliciting or introducing any evidence or argument regarding the purported commercial success of Gamimune N S/D.

II. ALLEGED EVIDENCE OF COMMERCIAL SUCCESS SHOULD BE EXCLUDED

The commercial success of an invention embodying the patent-in-suit may be a secondary indication that the invention is not obvious. *Merck & Co. v. Biocraft Labs., Inc.*, 874 F.2d 804, 809 n* (Fed. Cir. 1989) (evidence of commercial success was insufficient to avoid a finding of invalidity of the patent-in-suit). To prove commercial success, Plaintiffs need to establish: (1) they sell a product embodying the claimed invention of the '191 patent; (2) that their product is commercially successful; and (3) this commercial success was due to the patented features of the product, as opposed to factors unrelated to patented subject matter (e.g., superior marketing). *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988).

In his January 31, 2007 expert report, Mr. Bokhart provides a rebuttal opinion regarding the alleged commercial success of Gamimune N S/D, which Plaintiffs contend is the product that embodies the claims of the '191 patent. (*See* Rogaski Decl., Ex. 9 at 3.) For purposes of his

rebuttal report, Mr. Bokhart

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¹ (*See id.* at 4.) Conceding he is not qualified to render any opinion as to whether Gamimune N S/D practices the claims of the '191 patent, Mr. Bokhart relies on Plaintiffs' other witnesses to establish this essential element of the commercial success determination.² (*See id.*) However, none of them do.

Significantly, Plaintiffs' primary technical expert, Dr. Jeffrey Ravetch, testified at his deposition that he had *no* opinion as to whether Gamimune N S/D embodies the patented invention:

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(*See* Rogaski Decl., Ex. 10 (Ravetch Depo.) at 219:18-23.)

Dr. Ravetch's lack of opinion on this foundational issue is revealing, though not surprising. Baxter's invalidity expert, Dr. Thomas J. Kindt, reported – based on his review of the testing results from four of Plaintiffs' batch records – that

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(*See* Rogaski Decl., Ex. 11, (January 10, 2007 Expert Report of Thomas J. Kindt) at 53-54.) For example, there is no evidence of any

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¹ Mr. Bokhart is apparently confused by the relationship between a patent and its commercial embodiment: A patent is embodied by a certain product or process, *not* the other way around.

² Mr. Bokhart apparently misapprehends the narrow invention disclosed in the '191 patent by broadly equating liquid IGIV using a solvent/detergent process with the '191 patent. (*See* Rogaski Decl., Ex. 9 at 6, 7.) The '191 patent is not nearly so far-reaching.

REDACTED

³ Lacking these critical features, Gamimune N

S/D simply cannot embody the '191 patent.

With no proof (from Dr. Ravetch or elsewhere) that Gamimune N S/D practices the '191 patent – an essential requirement to the commercial success determination – there is no basis for Mr. Bokhart's opinions on commercial success. Therefore, Mr. Bokhart's rebuttal report and any other evidence Plaintiffs attempt to introduce regarding commercial success should be excluded.

III. CONCLUSION

For the foregoing reasons, Baxter's motion *in limine* to bar evidence and testimony regarding Plaintiffs' claim of commercial success of the '191 patent should be granted.

POTTER ANDERSON & CORROON LLP

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James G. Gilliland, Jr.
Susan M. Spaeth
Anne M. Rogaski
TOWNSEND AND TOWNSEND AND
CREW LLP
379 Lytton Avenue
Palo Alto, California 94301
(650) 326-2400

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By: /s/ Philip A. Rovner
Philip A. Rovner (#3215)
Hercules Plaza
P.O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000
Email: provner@potteranderson.com

*Attorneys for Defendant
Baxter International Inc. and
Defendant/Counterclaimant
Baxter Healthcare Corporation*

³ Dr. Ravetch also admits in his deposition that he does not opine as to whether Gamimune N S/D has an acceptable level of ACA suitable for intravenous administration, as disclosed in Claim 1 of the '191 patent. (See Rogaski Decl., Ex. 10 (Ravetch Depo.) at 222:21 - 223:4.)

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on April 28, 2007, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

BY HAND DELIVERY AND E-MAIL

Jeffrey B. Bove, Esq.
Mary W. Bourke, Esq.
Mark E. Freeman, Esq.
Jaclyn Mason, Esq.
Donna Hallowell
Connolly Bove Lodge & Hutz LLP
1007 N. Orange Street
P. O. Box 2207
Wilmington, DE 19899-2207
jbove@cblh.com, mbourke@cblh.com
mfreeman@cblh.com, jmason@cblh.com
dhallowell@cblh.com; cjeffers@cblh.com;
dhammond@cblh.com; mlambert@cblh.com

BY EMAIL

Dana K. Hammond, Esq.
M. Curt Lambert, Esq.
Connolly Bove Lodge & Hutz LLP
1007 N. Orange Street
Wilmington, DE 19899
jhammond@cblh.com; mlambert@cblh.com

Christopher E. Jeffers, Esq.
Connolly Bove Lodge & Hutz LLP
1990 M. Street, NW
Washington, DC 20036-3425
cjeffers@cblh.com

I hereby certify that on April 28, 2007 I have sent by E-mail and Federal Express the foregoing document to the following non-registered participants:

Bradford J. Badke, Esq.
Gabrielle Ciuffreda, Esq.
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
bradford.badke@ropesgray.com; gabrielle.ciuffreda@ropesgray.com

/s/ Philip A. Rovner
Philip A. Rovner (#3215)
Potter Anderson & Corroon LLP
Hercules Plaza
P. O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com